No. 90-1499

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

SIMON & SCHUSTER, INC.,
Petitioner,

v.

MEMBERS OF THE NEW YORK STATE
CRIME VICTIMS BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION, THE ALLIED EDUCATIONAL FOUNDATION, CITIZENS FOR LAW AND ORDER, THE MARYLAND COALITION AGAINST CRIME, THE NATIONAL VICTIM CENTER, PARENTS OF MURDERED CHILDREN, THE STEPHANIE ROPER FOUNDATION, AND 46 MEMBERS OF THE NEW YORK STATE LEGISLATURE IN SUPPORT OF RESPONDENTS

[THE NAMES OF THE STATE LEGISLATORS ARE LISTED ON THE INSIDE OF THE FRONT COVER]

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INTERESTS OF *AMICI CURIAE*

The *amici* are individuals and organizations concerned with promoting victims' rights in the criminal justice system. A further description of the *amici* is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

In 1977, the State of New York enacted Executive Law § 632-a, which authorized the New York State Crime Victims Board to establish escrow accounts into which those who contract with accused or convicted criminals regarding the reenactment of their crimes are required to pay all moneys owed on account of such contract.[1] The moneys deposited are to be paid to victims or legal representatives who obtain a money judgment for damages against the criminal (or legal representative) within five years of the date of the establishment of the escrow account. N.Y. Exec. Law § 632-a(1) (McKinney 1982). Funds may be drawn from the account (to a maximum of 20 percent) for the benefit of the person accused or convicted of a crime to help defray the expenses of legal representation or production of the book. *Id.* § 632-a(8). If unclaimed funds remain five years after the account is first established, payment of the remainder shall be made to the criminal or legal representative. *Id.* § 632-a(4).

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[1] Section 632-a affects every person or entity who contracts with a criminal with respect to the reenactment of the criminal's crimes. The medium of the reenactment may be a "movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind." It does not single out the press for special treatment, adverse or otherwise.

The legislative intent behind the law was succinctly stated by the law's chief sponsor, State Senator Emmanuel R. Gold:

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured -- while five people are dead and other people were injured as a result of his conduct. *This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.*

1977 New York State Legislative Annual 267 (memorandum of Sen. Gold) (emphasis added). Further evidence of the legislative purpose may be found in the Assembly's memorandum:

> Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to the resulting publicity. *This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their suffering.* The requirement of a civil action will prevent the abuse of this privilege.

Assembly Bill Memorandum Re: A 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws 823 (emphasis added).

The bill passed both houses of the state legislature and was signed into law by the Governor as Section 632-a of the Executive Law.[2]

There is nothing whatsoever in the legislative record that reveals or even suggests a calculated attempt on the part of the State of New York to limit the circulation of information, punish the press, or target expressive activity for special adverse treatment. The focus throughout was on the laudatory goal of preventing unjust criminal enrichment and assisting crime victims.

In the fourteen years since its enactment, Section 632-a has effectively prevented unjust enrichment and aided crime victims in the manner envisioned by the New York legislature. For example, the law successfully applied to bank robber John Wojtowicz, the role model for Al Pacino in the film "Dog Day Afternoon," so that Wojtowicz's film royalties, amounting to over $80,000, were distributed to three of his crime victims. *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (1979). Similarly, in 1987, a New York Supreme Court Justice ruled that Section 632-a allowed eight people victimized by the law's eponym, "Son of Sam" killer David Berkowitz, to receive shares of the more than $118,000 due to Berkowitz for book and movie deals. N.Y. Times, Sept. 2, 1987, at B3, col. 4.

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[2] Petitioner makes much of the fact that it took little time for Section 632-a to be enacted into law (Petitioner's Brief at 5), as if the State legislature should be condemned for being "unduly" responsive to the law-abiding citizenry it was elected to serve. Because it took little time for Section 632-a to become law, Petitioner implies that the law was poorly written. Whatever force this non sequitur may have had in 1977 has long since dissipated because the legislature has continued to monitor the problem and has enacted subsequent substantive amendments to Section 632-a. (1978 N.Y. Laws, C. 417, § 1; 1981 N.Y. Laws, s. 445, §§ 2, 3).

At least forty states[3] and the United States Congress[4] have adopted laws similar to Section 632-a, which was the first of its kind in the nation. As was the case in New York, the motivating event behind many of these laws was a sensational crime within the jurisdiction whereby the criminal stood to profit from the experience. *See* Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1355 (1988).

In this case, Henry Hill was a career criminal, formerly employed in New York by the Lucchese Mafia family. When he came to the attention of Petitioner Simon & Schuster, Hill was cooperating with state and federal prosecutors under the Federal Witness Protection Program. He agreed to collaborate with author Nicholas Pileggi on a book describing his activities as a low-level member of a criminal enterprise. The book, entitled *Wiseguy*, described in detail his participation in bribery, assault, extortion, theft, burglary, arson, drug dealing, credit card fraud, and murder. *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 779 (2d Cir. 1990). As the Second Circuit opinion concluded: "Needless to say, there were many, many victims of the crimes committed by Henry Hill, and a great number of those victims are identified in *Wiseguy*." *Id.*

On January 31, 1986, the Crime Victims Board advised Petitioner that the publication of *Wiseguy* fell within Section 632-a's coverage. Specifically, the Board

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[3] *See In the Matter of Children of Bedford, Inc. v. Petromelis*, ___ N.Y.2d ___ (New York Court of Appeals, May 7, 1991), slip opinion, at 16 n.3.

[4] 18 U.S.C. § 3681 (1988).

concluded that *Wiseguy* was subject to Section 632-a because it contained statements regarding Hill's admitted involvement in many violent and brutal crimes against the citizens of the State of New York. Therefore, the Board ordered Petitioner to pay all money it had paid or would be paying to Hill for his work on the book to an escrow account for the potential claims of his victims.

Petitioner brought this action challenging Section 632-a on First Amendment grounds and contending that Section 632-a directly burdened the exercise of First Amendment rights. The District Court rejected this contention and held that the law involved only incidental burdens on First Amendment freedoms and was justified by the state's interest in compensating victims. *Simon & Schuster v. New York State Crime Victims Board*, 724 F. Supp. 170, 178-79 (S.D.N.Y. 1989). On appeal, the Second Circuit affirmed, holding that although in its opinion the law imposed a direct burden on speech, the state interest in preventing criminals from profiting from their crimes while the victims of the crime remain uncompensated for their financial losses occasioned by the crime was a compelling interest. *Fischetti*, 916 F.2d at 782.

This Court granted the petition for certiorari on February 19, 1991. ___ U.S. ___, 111 S. Ct. 950 (1991).

SUMMARY OF ARGUMENT

Section 632-a is a regulation of nonexpressive conduct. It does not prohibit or otherwise regulate expression. It regulates the disposition of money that a publisher has agreed to pay as a result of a contract between the publisher and the criminal for publication of the criminal's account of his crimes.

The law does not affect the freedom of a willing speaker to engage in expressive conduct. If a criminal is less willing to speak because the prospect of payment has been tempered by the application of Section 632-a, it is on account of a regulation of conduct, not speech. Its effect, therefore, would be on the amount of money needed for a publisher to persuade the criminal to speak. As such, it affects conduct not speech. This Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988), is not a bar to any financial disincentive because *Meyer*'s holding relates to restrictions on the political process itself, which have traditionally triggered a higher level of scrutiny.

The law does not single out the press for adverse treatment of the type condemned by this Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The financial burden, if any, is laid on the criminal, not the media. The publisher's only financial obligation is triggered by failure to comply with the law's garnishment provisions, not from the exercise of First Amendment freedoms. The law is not a content-based regulation of speech or expressive conduct and therefore does not come under the doctrine of *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). There are many instances where the law regulates nonexpressive conduct on the basis of what a person says.

Because Section 632-a is a regulation of nonexpressive conduct, it is properly subject to a rational basis analysis. The activity regulated -- the disposition of proceeds of the contract between a criminal and a publisher -- is nonexpressive conduct. There is no speech element involved in the regulation. If this Court decides, however, that there is a speech element which cannot be separated from the nonexpressive conduct regulated by the

law, then this Court should apply the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The manner of payment under the contract is not protected activity. At most, the regulation of the payment is only an incidental burden on free speech. The effect, if any, would be to increase the amount of compensation offered by the publisher in order to persuade the criminal to speak.

Section 632-a meets the *O'Brien* standards. The state's interest in assuring that a criminal does not profit from his crime while the victims of the crime are in need of compensation is important and substantial, if not compelling. This interest is unrelated to the suppression of expression. The Second Circuit erred in this case when it held *O'Brien* inapplicable because it believed the law had a relation to expression. The incidental restriction on speech, if any, is no greater than is essential to the furtherance of the state's interest.

Even if this Court applies the strict scrutiny standard, Section 632-a is constitutional. The state's interest is compelling, and both the Second Circuit and the New York Court of Appeals have found that the means used are narrowly tailored to achieve this end without unnecessarily abridging freedom of speech. The criminal is free to speak; the publisher is free to publish and distribute the book. The payments to the criminal are in effect garnished until the victims are fully compensated. Earnings from writings about prison life in general or from subsequent employment as an "expert" are not attached. The reach of Section 632-a is limited to the new assets arising from criminal activity which has left victims uncompensated for their losses. As such, it is narrowly tailored to achieve New York's compelling interest in preventing the unjust enrichment of a criminal until the valid claims of the victims have been redressed.

ARGUMENT

I. The New York Statute Does Not Impose Any Direct Burden on the First Amendment Right of Free Speech.

The proper starting point for analyzing whether Section 632-a contravenes the First Amendment is to determine whether it abridges the exercise of free speech. Petitioner is unable to point to anything in the statute that directly prohibits either a criminal from telling the story of his crimes to a book publisher, or a book publisher from subsequently publishing an account of the story. Section 632-a operates to reduce the profit-making motive of criminals with respect to media reenactments of crimes. It does this by regulating *conduct*.

Section 632-a prevents the criminals from profiting from the reenactment of the crime while victims remain uncompensated as a result of the wrongdoing. Section 632-a does not prohibit expression; it merely removes the criminal's expectation of immediate and direct compensation for the reenactment of the crime through the media.

The issue in this case is therefore not whether the State of New York can enact a law forbidding publishers from publishing books written by convicted criminals. Nor is it whether New York has the power to restrict or censor speech it deems offensive. Rather, the issue is whether New York may control the disposition of money that a publisher has pledged to a criminal as the result of a contract between the publisher and the criminal for the publication of the criminal's account of his crimes. As such, nothing in Section 632-a infringes upon the exercise of freedoms protected by the First Amendment.

A. Section 632-a Does Not Affect the Freedom of a Willing Speaker To Engage in Expressive Conduct.

In this case, it is undisputed that Petitioner's book was actually written, published, and sold. Nevertheless, Petitioner contends that Section 632-a constitutes a direct burden upon the exercise of First Amendment rights. Specifically, it contends that the law has "led to decisions not to write and not to publish certain works, and to self-censor discussion of events which books otherwise would have included, to avoid triggering the law." Petitioner's Brief at 19. The "evidence" to support this claim, besides being speculative and self-serving, rests on an erroneous premise.

The argument that Section 632-a violates the First Amendment because it *might* deter the criminal from telling the story of his crimes assumes that a right to be compensated is protected by the First Amendment. Petitioner goes so far as to suggest that "the incentive of economic gain is the engine that drives free expression." Petitioner's Brief at 20. In other words, Section 632-a is said to make it more difficult for Petitioner to persuade criminals to speak about their crimes. But "[f]reedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). If a criminal is less willing to speak because the prospect of payment has been tempered by the application of Section 632-a, it is on account of a regulation of conduct, not speech. The fact that the law requires payments from the publishers to be applied first towards victim compensation does nothing in and of itself to preclude the exercise of speech. The effect, if any, would be to increase the amount of compensation offered by the publisher in order to persuade the criminal to speak.

Petitioner cites *Meyer*, 486 U.S. 414, as supporting the proposition that "payments necessary to make and disseminate speech can no more be restricted than the speech itself." Petitioner's Brief at 13. Petitioner's contention is not supported by a careful reading of this case. *Meyer* invalidated a Colorado statute which made it a felony to compensate circulators of initiative petitions. The Court observed that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421-22. This is consistent with the heightened scrutiny reserved for review of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

In contrast, Section 632-a does not restrict the political processes, either directly or indirectly. An attempt to control the proceeds of a contract between a criminal and a publisher does not in any way touch upon the political processes. Moreover, unlike the law invalidated in *Meyer*, Section 632-a does not prohibit the conduct, it simply regulates it. Thus, while Colorado banned the use of paid circulators, the criminal remains free to contract with a publisher and to tell his story.

The political context of *Meyer* is very important. The *Meyer* Court, like the Colorado Supreme Court, viewed the restrictions as "reducing the total quantum of speech on a public issue." *Id.*, 486 U.S. at 423. In the political context, this is a sound approach. *Carolene Products*, 304 U.S. at 152 n. 4. Petitioners, however, attempt to state this language as a general proposition, applicable to all speech. Petitioner's Brief at 17. As a general principle, invalidation of any regulation which

restricts the quantity of speech would be overly broad. It would obliterate the distinction between direct and indirect or incidental burdens (*O'Brien*, 391 U.S. at 376-77) and would undermine the time, place, and manner restrictions long recognized by this Court. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 (1986) (the argument that requiring the respondents to move their bookselling business to another location would have impermissibly burdened their First Amendment freedoms "proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities").

Similarly, Petitioner's reliance upon *Buckley v. Valeo*, 424 U.S. 1 (1976), is misplaced. As with *Meyer*, the meaning of *Buckley* should not be separated from its political context. The limitation on campaign expenditures was held to be a direct limitation on the quantity of political communication of a candidate or campaign. *Id.* at 18. This is a direct restriction on the political process itself. The Court analogized the restriction to "being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18. While this is an apt observation on the impact of expenditure limitations on political communications, the analogy does not fit the instant case, as Petitioner contends. Petitioner's Brief at 21. There are no monetary limitations on how much the publisher may pay the criminal for his story. The requirements of Section 632-a deal with the manner of the payment to the criminal, not the extent of any payment. As such, Section 632-a is more closely analogous to the time, place, and manner restrictions distinguished by the *Buckley* Court. *Buckley*, 424 U.S. at 18.

Petitioner argues that removing the financial incentive for the criminal will necessarily impede the production of

speech. Petitioner's Brief at 18-21. A similar argument was rejected by this Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, the newspaper reporters argued that the First Amendment protected the confidentiality of their sources. Specifically, it was claimed that without the assurance of confidentiality, informants would refuse or be reluctant to furnish newsworthy information in the future. *Id.* at 682. This, of course, is very similar to the contention advanced by Petitioner in this case. The *Branzburg* Court viewed the evidence of the inhibiting effect as essentially speculative (*id.* at 693-94) but assumed for purposes of argument that some potential informants would not talk with reporters for fear of identification. *Id.* at 695. Nevertheless, such an impact on the news gathering capabilities of the media was not sufficient to override "the public interest in pursuing and prosecuting those crimes reported to the press by informants and thus deterring the commission of such crimes in the future." *Id.*

In responding to the argument that refusal to recognize a reporter's privilege under the First Amendment would undermine the freedom of the press, the *Branzburg* Court replied that the lessons of history taught otherwise. *Id.* at 698. This Court concluded, "The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press." *Id.* at 69. In other words, experience and common sense can sometimes serve as a better guide to the future than reliance on self-serving affidavits. The experience under Section 632-a is similarly instructive. For nearly ten years after enactment of Section 632-a, no book publisher mounted any broad-based legal challenge

to the law's alleged "chilling effect" on its press rights.[5] Nor was there any noticeable decline in the number of criminal books being written and published. It is clear that the rights of the publisher and the willing speaker remain unaffected by Section 632-a.

B. Section 632-a Neither Singles Out the Press Nor Sanctions a Content-Based Regulation of Speech.

By its terms, Section 632-a is applicable to "[e]very person, firm, corporation, partnership, association or other legal entity contracting with any person . . . accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine, article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind. . . ." N.Y. Exec. Law § 632-a(1) (McKinney 1982). Petitioner argues that the law has thereby singled out the press for adverse treatment, relying principally upon *Minneapolis Star*, 460 U.S. 575, and *Arkansas Writers' Project*, 481 U.S. 221. Petitioner's Brief at 21.

Minneapolis Star and *Arkansas Writers' Project* stand for the proposition that a discriminatory tax imposed on the press places such a burden on the interests protected by the First Amendment that the state must demonstrate the tax serves a compelling governmental interest which cannot be achieved without differential taxation. Apart from the question of whether these cases are intended to be applied beyond the area of taxation, it is clear that

[5] In this regard, *amici* are at something of a loss to understand why a law characterized by Petitioner as "intolerable" and "presumptively violative of the First Amendment" (Petitioner's Brief at 14) was not challenged shortly after enactment. The apparent answer is that these characterizations are simply hyperbole.

Section 632-a is not intended to subject the press, or the media generally, to adverse treatment. The press is not required to shoulder any greater financial burden than an employer served with a writ of garnishment. Unlike the taxes invalidated in *Minneapolis Star* and *Arkansas Writers' Project*, the payments are not intended to come out of the financial resources of the press but rather from the proceeds of the contract with the criminal. Only if the entity which has contracted with the criminal chooses to ignore the statute can there be any adverse financial impact. This is no different, however, than the exposure of an employer who pays wages to an employee after being served with a writ of garnishment. *See, e.g.*, N.Y. Civ. Prac. L & R § 5231(f) (McKinney Supp. 1991); Calif. Civ. Proc. Code § 706.154(a) (West 1987); S.D. Codified Laws Ann. § 21-18-12 (Michie 1987). The employer in such a situation is not taxed or penalized on account of the employee's activities but rather on account of its own failure to comply with the law. In this case, Petitioner's obligation to pay a sum from its financial resources arises not due to the exercise of First Amendment freedoms, but due to its failure to comply with the law.[6] By contrast, the taxes imposed in *Minneapolis Star* and *Arkansas Writers' Project* were a result of their publishing activities. In sum, Section 632-a does not single out the press for the imposition of any financial burden because of the exercise of its First Amendment freedoms.

Petitioner also contends that the regulation imposed by Section 632-a is content-based and therefore subject to strict scrutiny. Petitioner's Brief at 22. The doctrine

[6] There can be no argument in this case that Petitioner lacked sufficient notice of the applicability of Section 632-a. Indeed, Petitioner abandoned its due process argument on appeal to the Second Circuit. *See Fischetti*, 916 F.2d at 781.

referred to by Petitioner has been articulated in *Mosley*, 408 U.S. at 96:

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

The doctrine regarding content-based regulation extends to expressive conduct as well. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 412 (1989). The reach of this doctrine is clearly defined: government may not regulate speech or expressive conduct on the basis of the content of the speech or expressive conduct.

In this case, Section 632-a does not regulate speech or expressive conduct, it regulates the contract between the criminal and the publisher. *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 724 F. Supp. 170, 177 (S.D.N.Y. 1989) ("[t]he speech itself is not the target of section 632-a; the profit-making aspect is the target"). There is nothing in the content-based regulation cases which extends the doctrine to include regulation of nonexpressive conduct. *See, e.g., Johnson*, 491 U.S. 397 (prohibition of flag desecration by burning is a content-based regulation of expressive conduct); *Boos v. Barry*, 485 U.S. 312 (1987) (ban on signs within 500 feet of foreign embassy if the sign expressed views against the foreign government is a content-based regulation of speech); *Arkansas Writers' Project*, 481 U.S. 221 (taxation or exemption of magazine publications on the basis of content is a regulation of speech); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (prohibition of editorializing by noncommercial educational broadcasting

tation is a content-based regulation of speech); *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980) (regulation of utility bill inserts is a content-based regulation of speech); *Carey v. Brown*, 447 U.S. 455 (1980) (prohibition of picketing except for labor disputes is a content-based regulation of speech and expressive conduct); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (prohibition of films containing nudity by a drive-in theater is a content-based regulation of speech); *Mosley*, 408 U.S. at 96 (prohibition of picketing within 150 feet of school building except for labor picketing is a content-based regulation of speech and expressive conduct).

It is appropriate, and at times necessary, for government to regulate nonexpressive conduct with content-based criteria. The law of antitrust, for example, prohibits agreements among competitors to allocate markets or to fix prices. *See, e.g., Palmer v. BRG of Georgia, Inc.*, ___ U.S. ___, 111 S. Ct. 401 (1990); *Goldfarb v. Virginia State Bar*, 421 U.S. 733 (1975) (county bar's *publication* of fee schedule was part of an unlawful price-fixing scheme). Federal securities law regulates false or misleading statements made in connection with the sale of securities. *See, e.g., SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969). Federal bankruptcy law denies a discharge of indebtedness for a debtor who knowingly makes a false oath in connection with the case. 11 U.S.C. § 727(a)(4) (1988). Rule 11 of the Federal Rules of Civil Procedure authorizes a court to impose sanctions against a party or counsel if the pleading, motion, or other paper is not well grounded in fact, law, or equity. *See, e.g., Business Guides v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, 111 S. Ct. 922 (1991). These are just a few of countless instances where the law regulates nonexpressive conduct based on its content. Section 632-a is

yet another example -- the telling of the story of the crime or criminal activity triggers the state's regulation, not of the publication, but of the disposition of proceeds from the contract between the criminal and the publisher.

II. Because Section 632-a Is a Regulation of Nonexpressive Conduct, It Is Properly Subject to a Rational Basis Analysis.

With respect to the appropriate level of scrutiny to be applied to Section 632-a, Petitioner has argued for strict scrutiny and has attempted to distinguished the lower level of scrutiny set forth in *O'Brien*, 391 U.S. 367. *Amici* submit that neither strict scrutiny nor *O'Brien* scrutiny is appropriate in this case; rather, Section 632-a should be analyzed under a "rational basis" approach. When, as here, a law only regulates nonexpressive conduct and does not indirectly burden speech, rational basis is the appropriate standard. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). That rule of law is implicit in *O'Brien* because it dealt with "speech" and "nonspeech" elements combined in the same course of conduct. *Id.* at 376. *O'Brien*'s standard is inapplicable unless there is at least some element of speech in the conduct to be regulated. It follows, *a fortiori*, that the strict scrutiny standard requires an even greater element of speech in the regulated conduct. *See, e.g., Johnson*, 491 U.S. 397.

In the present case, the activity regulated is nonexpressive conduct; it has *no* speech element. Section 632-a does not prohibit or regulate in any way the actual writing, publication, or sale of the reenactment of a criminal's crime. It regulates the disposition of the proceeds of the contract between the criminal and the publisher. Both the criminal and the publisher are free, as they were in this case, to collaborate and publish the story. The Board may not prohibit or in any way impose

conditions on the distribution and sale of the book if the publisher does not comply with Section 632-a. The law regulates nonexpressive conduct alone.

Under the rational basis approach, it is clear that Section 632-a is rationally related to a legitimate state interest. Petitioner concedes that the interest of the state in providing compensation for crime victims is a legitimate one. Petitioner's Brief at 28. The state's interest in preventing a criminal from profiting from a crime while the victim of the crime remains uncompensated is certainly no less a legitimate interest. *See, e.g., Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989) ("[t]he Government's interest in winning undiminished forfeiture thus includes the objective of returning property, in full, to those wrongfully deprived or defrauded of it"); *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) ("[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime").

Section 632-a is unquestionably a rational manner of realizing the state's legitimate interest. The only assets reached by the statute are the proceeds from the product -- a story -- created by the criminal's illegal activities. *See Children of Bedford*, slip opinion at 19. The funds are to be paid to those victims who establish valid claims against the criminal in a court of competent jurisdiction. Accordingly, Section 632-a is a rational approach to the advancement of the state's legitimate interests, and the statute should therefore be upheld.

III. Any Effect of Section 632-a on Free Speech Is at Most Incidental, and Thus the Statute Should Be Subject to No Higher Standard of Scrutiny Than the *O'Brien* Standard.

If the criminal's reenactment of the story of the crime and the contract between the criminal and the publisher are considered to be indivisible and thus are treated as a unit of conduct, then it is necessary to determine the extent to which such conduct is protected by the First Amendment. The telling of the story is clearly protected activity, and thus the issue becomes: (1) whether the manner of payment under the contract is protected activity, and (2) if not, whether regulation of the manner of payment involves a direct burden on the protected element of the activity -- the telling of the story. If the manner of payment is not protected activity and if its regulation presents at most an incidental burden on the exercise of free speech, the appropriate level of scrutiny will be found under the *O'Brien* case.

A. The Manner of Payment Under the Contract Is Not Protected by the First Amendment.

Section 632-a regulates the receipt of payment by the criminal under the contract with the publisher. It neither prohibits compensation nor regulates the amount of compensation agreed between the parties. The law simply requires that payment be made to an escrow fund for distribution to victims who may become judgment creditors within the requisite time period. Section 632-a in effect regulates the time, place, and manner of the payments under the contract.[7]

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[7] Compensation to the criminal is merely delayed, not foreclosed. Section 632-a allows any remaining funds held in escrow not claimed (continued...)

Payments made to the criminal for the right to publish the reenactment of the crime or the criminal's "thoughts, feelings, opinions or emotions regarding such crime" are in reality proceeds of the criminal activity. In committing crime, the criminal may "create, by illegal activity, a new product -- a story -- which becomes profitable in the retelling." *Children of Bedford*, slip opinion at 19. It is the crime itself which creates the story,[8] and it is the telling of the story by the criminal which generates the profits. The crime may serve to create a right of publicity which the law under other circumstances recognizes as a protected property right. *Cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

Because payments made to a criminal for the media rights to the story of the crime are essentially proceeds of the crime itself, the action taken by New York in this case is indistinguishable from the forfeiture upheld in *Caplin*, 491 U.S. 617. In *Caplin*, this Court rejected Fifth

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[7] (...continued)
by victims to be turned over to the criminal at the expiration of five years from the date the escrow account is established. N.Y. Exec. Law § 632-a(4) (McKinney 1982).

[8] Of course, not all crime creates a story of interest to the general public. First Amendment attorney Martin Garbus, who represents several New York-based publishers, expressed the irony of the situation with this observation:

> You have to balance two factors: people like Berkowitz making a bundle of money and free press. I think free press is the more important issue. On the other hand, criminals can say the grosser the crime, the more money is in it for me, so instead of killing one person, I'll kill seven.

Washington Post, Aug. 18, 1987, at A5, col. 1.

and Sixth Amendment challenges to the forfeiture provisions of the criminal enterprise statutes, holding that a criminal cannot retain proceeds of the crime in order to exercise constitutional rights. *Id.* at 632-33. Likewise, payments received by the criminal for media rights to the crime should be regarded as proceeds of criminal activity and therefore unprotected by the First Amendment.

No attempt is made under Section 632-a to prevent the criminal from writing about or providing the media with an account of the crime. In fact, Section 632-a allows a portion of the payments to be received under the contract to be used for the necessary expenses incurred in telling the story. N.Y. Exec. Law § 632-a(8) (McKinney 1982). No attempt is made to prevent the publisher from publishing, distributing, or selling the story. The sole activity regulated by Section 632-a is the manner of payment to the criminal under the contract. This activity cannot be regarded as protected by the First Amendment.

B. Section 632-a Presents at Most an Incidental Burden on the Exercise of Free Speech.

If the manner of payment is not protected by the First Amendment, then the question is whether the state's regulation of the unprotected activity directly burdens the exercise of protected freedoms. As noted earlier, "Freedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). Petitioner's contention that it must persuade the criminal with offers of immediate financial compensation may lead one to question the sincerity of the supposed "willing" criminal author. In any event, this Court has held that a similar disincentive on informants constituted at most only an incidental burden on the gathering of news information

by reporters. *Branzburg*, 408 U.S. at 693-95. Section 632-a does not prohibit or limit the amount of money to be paid under the contract. The parties may take into account the estimated damages owing to the criminal's victims when agreeing on an amount of compensation. Section 632-a may have the effect of increasing the publisher's offer in order to persuade the criminal to speak. As such, it has only an incidental effect on the exercise of First Amendment rights.

The "inevitable effect" of Section 632-a is *not* the suppression of speech. *See O'Brien*, 391 U.S. at 384. The inevitable effect of the law is that victims of the criminal's wrongdoing will be given an opportunity to receive compensation from the proceeds of the media account of the crime. Because Section 632-a involves, at most, only incidental effects on the exercise of protected activities, the *O'Brien* standard should be used in the event the rational basis standard is found inapplicable.

IV. Section 632-a Passes Muster Under the *O'Brien* Standard.

"[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. The *O'Brien* standard is as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater

than is essential to the furtherance of that interest.

Id. at 377.

The District Court in this case held that "the New York state legislature acted within its authority in enacting [Section 632-a]." *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 724 F. Supp. 170, 178 (S.D.N.Y. 1989). Petitioner does not contest this conclusion. The remainder of the *O'Brien* criteria are considered separately.

A. The State's Interest is Important and Substantial.

New York's interest in enacting Section 632-a exceeds the *O'Brien* standard because the interest is not only important and substantial, but also compelling:

> It cannot be gainsaid that the state has a very strong interest in preventing criminals from profiting from their crimes. [Citations omitted]. But the state has a much stronger, indeed a compelling, interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization. . . . Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime.

Fischetti, 916 F.2d at 782. *See also Children of Bedford*, slip opinion at 13.

B. The State's Interest Is Unrelated to the Suppression of Expression.

As the Second Circuit observed of Section 632-a, "The purpose of the statute, of course, is not to suppress speech but to assure that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited." *Fischetti*, 916 F.2d at 783. The legislative history, as well as the statutory language itself, is devoid of any indication that the statute was enacted in order to suppress the criminal's right to tell the story of the crime. The law is viewpoint neutral. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986). In fact, the law even encourages publication by making a portion of the funds available for production costs. Section 632-a therefore cannot be characterized as relating to the suppression of expression.

Even though the interest of New York is clearly unrelated to the suppression of expression, the Second Circuit in this case rejected the apparent contention that the governmental interest bore "no relation to expression" and held that *O'Brien* was therefore inapplicable. *Fischetti*, 916 F.2d at 781. However, this Court has never required under the *O'Brien* approach that a regulation be completely divorced from any impact on speech. *O'Brien* expressly deals with the combination of speech and nonspeech elements. *O'Brien*, 391 U.S. at 376. If there are no speech elements implicated, then the rational basis approach would apply. *See* Section II, *supra*. The Second Circuit thus misspoke when it articulated the standard as "no relation to expression" rather than *O'Brien*'s "unrelated to the *suppression* of *free* expression." *Id.* (emphasis added). *See Johnson*, 491 U.S. at 410 (flag-burning statute related to the "suppression of free

expression" and thus is "outside of *O'Brien*'s test altogether"). In this case, Section 632-a's impact or nexus with speech, if it exists, is compatible with application of the *O'Brien* standard, because it is the criminal's own nonprotected conduct (the criminal activity leaving victims in need of compensation) which gives rise to the necessity of the regulation. *See City of Renton*, 475 U.S. at 48 (1986). The state's interest is therefore entirely unrelated to the suppression of free expression.

C. The Incidental Restriction on Alleged First Amendment Freedoms, If Any, Is No Greater Than Is Essential to the Furtherance of that Interest.

The District Court in its application of the *O'Brien* standard found that the line drawn by Section 632-a did not operate to prohibit expressive activity, but effectively garnished the proceeds from the contract with the publisher. *N.Y. State Crime Victims Board*, 724 F. Supp. at 179. Section 632-a does not attempt to attach proceeds from others, such as Nicholas Pileggi, who write about crime. It is limited to moneys generated by the reenactment of the crime and does not attach to the criminal's other assets. It does not apply to victimless crimes. *In re Halmi*, 12 Media L. Rptr. 2388 (Sup. Ct. N.Y. County), *aff'd*, 512 N.Y.S.2d 650 (1987); *In the Matter of Bernhard Hugo Goetz*, slip opinion at 7-8 (N.Y. State Crime Victims Board, May 17, 1988). Section 632-a delays, but does not foreclose, payment to the criminal. There is limited access to the funds for legal representation or the necessary expenses of production. Moneys remaining in the account after five years are paid to the criminal. For basically the same reasons that both the Second Circuit and the New York Court of Appeals found that § 632-a satisfied the strict scrutiny standard, the incidental restrictions on speech, if any, are no greater

than is essential to the furtherance of the state's interest. *Fischetti*, 916 F.2d at 783-84; *Children of Bedford*, slip opinion at 17-20.

V. Even If This Court Applies Strict Scrutiny, Section 632-a Is Constitutional.

If strict scrutiny is the applicable constitutional standard against which Section 632-a must be measured, the state must show both that the statute furthers a compelling governmental interest and that the means employed are "closely drawn to avoid unnecessary abridgment." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (quoting *Buckley v. Valeo*, 424 U.S. at 25). The two courts that have subjected Section 632-a to strict scrutiny analysis have both concluded that it meets these standards. *Fischetti*, 916 F.2d at 782-84; *Children of Bedford*, slip opinion at 13-20.

As discussed before, New York's interest is in ensuring that a criminal does not profit from his crime while his victims remain uncompensated for their losses occasioned by the wrongdoing. Both courts found this interest to be a compelling governmental interest. *Fischetti*, 916 F.2d at 782; *Children of Bedford*, slip opinion at 13-16. Petitioner apparently does not contest this assessment of the nature of the interest. Petitioner's argument is devoted to the question of whether the means are narrowly tailored to serve this interest.

The appropriateness of the means used to achieve the governmental interest has been analyzed briefly in connection with the *O'Brien* standard. *See* Section IV.C, *supra*. In addition, the Second Circuit's opinion addressed the "fit" between the interest and the means used:

> The statute recognizes that the only way a criminal can profit directly from a specific crime involving a particular victim, other than by obtaining any proceeds of the crime itself, is by writing or talking about or reenacting it. The statute also recognizes that, as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes. The first amendment right to speak is restricted only as a consequence of their inability to profit until the victim is compensated. Section 632-a is designed to tie up the proceeds until victims have had an opportunity to make their claims for compensation. It provides a specialized form of attachment and is designed to freeze the proceeds of storytelling by criminals for the benefit of those whose misfortunes gave rise to the story.

Fischetti, 916 F.2d at 783. Petitioner argues that the Court of Appeals' analysis is a circular approach which renders strict scrutiny analysis essentially toothless. Petitioner's Brief at 42. Petitioner's argument is without merit. When drafting statutes which touch upon the exercise of constitutional rights, the legislature is acting in the interest of the State of New York. This is precisely the requirement which needs to be, and is, met.

The New York Court of Appeals likewise found that the means were narrowly tailored to achieve the statute's purpose:

> A criminal may earn income from writings on such subjects as prison life in general, as Harris has (*see Harris v. Abate* [Sup. Ct. N.Y. Co.], NYLJ 4/2/90, at 25, col. 3), or may subsequently obtain profitable employment as an "expert," as petitioners' hypothetical computer expert. That

> financial success is the result of their newly advertised expertise or prominence, not their illegal act. By contrast, criminals covered by the statute had no marketable asset before the crime: they create, by illegal activity, a new product -- a story -- which becomes profitable in the retelling.

Children of Bedford, slip opinion at 18-19.[9]

The reach of Section 632-a is limited to the new asset arising from criminal activity which has left victims uncompensated for their losses. As such, the statute is narrowly tailored to achieve New York's compelling interest in preventing the unjust enrichment of a criminal until the valid claims of the victims have been redressed.

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[9] *See also Fischetti*, 916 F.2d at 784:

> The general expertise derived by a thief from a series of thefts is not the same as the tale of a specific theft committed against an identifiable victim. Payment for expertise, royalties from books that do not describe crime victims, and other income and assets of criminals may be reached in other ways. Section 632-a deals with readily identifiable, locatable funds that are most commonly available to those who victimize others.

CONCLUSION

For the reasons stated herein, the Court should reject the contention that Section 632-a is unconstitutional, and the judgment below should be affirmed.

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APPENDIX

INTERESTS OF *AMICI*

The Washington Legal Foundation (WLF) is a national public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victims' rights. WLF works with other victims' rights groups, including some of the *amici* in this case. WLF has appeared before this Court as *amicus curiae* in a number of cases dealing with victims' rights issues, including the recent case of *Payne v. Tennessee*, No. 90-5721.

The Allied Educational Foundation (AEF) is a non-profit, charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

Citizens for Law and Order (CLO) is a grass-roots organization in the state of California devoted to supporting law enforcement agencies in that state in their efforts against crime. CLO supports measures in the California legislature designed to strengthen the criminal justice system. CLO was founded in 1970.

The Maryland Coalition Against Crime (MCAC) is based in Baltimore, Maryland. MCAC works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims.

The National Victim Center is a national, non-profit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase public awareness concerning the plight of crime victims through educational programs, conferences, and publications.

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national, non-profit, self-help support group organization based in Cincinnati, Ohio with chapters nationwide. Besides providing support for grieving parents and family members, POMC supplies information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family. POMC has appeared as an *amicus* in several cases.

The Stephanie Roper Foundation, Inc. (the Foundation) is a private, non-profit, volunteer-based organization in Maryland. The Foundation and its sister organization (The Stephanie Roper Committee, Inc.) provide free assistance to crime victims including information, legal help, and support groups. The Foundation is named for the victim of a brutal rape and murder, whose family members were treated unfairly and denied any rights of participation in the trial proceedings. Consequently, the Foundation and its sister organization were created to improve the plight of victims of crime. Maryland's version of the "Son of Sam" law was one of 22 major legislative enactments proposed by the Committee and enacted into Maryland law. The Foundation believes the current case provides an opportunity to reaffirm that criminals should not benefit from their illegal acts, and that victims should have the ability to be adequately compensated for their injuries.

In addition, forty-five members of the New York State legislature have joined in this brief as *amici*. Their names are listed on the back of the front cover of this brief. L. Paul Kehoe is the Chairman of the New York State Senate Committee on Crime and Correction. James P. King is the Co-Chairman of the New York State Assembly Republican Task Force on Crime Victims' Rights. Clarence D. Rappleyea, Jr. is the Minority Leader of the New York State Assembly. Robert C. Wertz is the Assistant Minority Leader of the New York State Assembly. George H. Winner, Jr. is the Minority Leader *Pro Tempore* of the New York State Assembly.